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Supreme Court, U.S.
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CAUSE NO. 01-335

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2000 TERM

GARY GIBSON, Warden,
Oklahoma State Penitentiary,

Petitioner/Cross-Respondent,

v.

MARK DAVID JOHNSON,

Respondent/Cross-Petitioner.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

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MOTION TO PROCEED IN FORMA PAUPERIS

Stephen J. Greubel
406 S. Boulder, Suite 495
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(918) 582-6750
Counsel of Record
Counsel for Respondent/Cross-Petitioner
Mark David Johnson

September 24, 2001

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10 pm

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent/Cross-Petitioner Mark David Johnson, by and through his attorney Stephen J. Greubel, a member of the Bar of the Supreme Court of the United States, moves this Court for an order allowing him to proceed *in forma pauperis* in the captioned matter. Pursuant to Rule 39.1 of this Court, and 18 U.S.C. §3006A(d)(7), Mr. Johnson is not required to submit the affidavit described in 28 U.S.C. §§1746 and 1915(a), and prescribed in Form 4 of the Federal Rules of Appellate Procedure. The United States Court of Appeals for the Tenth Circuit, acting pursuant to 21 U.S.C. §848(q), previously appointed undersigned Counsel to represent Mr. Johnson on appeal.

Pursuant to Supreme Court Rule 12.2, this Motion precedes and is being attached to the Brief in Opposition to Petition for Writ of Certiorari.

Respectfully submitted,

Stephen J. Greubel
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Counsel of Record
Attorney for Respondent/Cross-Petitioner

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The underlying facts of the issue presented are simple and not in serious dispute. The State of Oklahoma sought a sentence of death for Respondent Johnson based on the aggravating factor that he would continue to pose a danger to society. The sentencing jury was provided with instructions allowing for three possible sentences: (1) death; (2) life without possibility of parole; and (3) life imprisonment. During its deliberations, the jury inquired in a note to the trial judge: "We need to know! Is life without parole firm – Does it mean he can never be paroled." Trial Court Ex. #2. The trial court responded, over objection of defense counsel, "[i]t is inappropriate for you to consider the question asked." The jury then returned a sentence of death.

The United States Court of Appeals for the Tenth Circuit granted relief in Respondent Johnson's appeal from a federal habeas corpus proceeding. The Tenth Circuit's decision relied upon this Court's due process concerns expressed in the decisions of *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Shafer v. South Carolina*, 121 S.Ct. 1263 (2001). In essence, the Tenth Circuit concluded that the trial court's response to the jury's question improperly directed the jury not to consider parole eligibility when, in fact, consideration of parole eligibility was required by Oklahoma law, federal due process concerns, and this Court's decisions in *Simmons* and *Shafer*.

Petitioner Gibson exaggerates the ramifications flowing from the Tenth Circuit's decision granting limited relief to Respondent Johnson. Petitioner Gibson premises his concerns on erroneous and/or skewed versions of the events below. Respondent Johnson did not present as an issue the question of whether the jury should have been apprised of the intricacies of

Oklahoma's parole and clemency statutes.[1] Nor did Respondent Johnson "tak[e] out of context" the trial judge's answer to the jury's question.[2] Nothing in the Tenth Circuit's decision suggests that the deference due to state court adjudications under the AEDPA are being "gut[ted]."

The Tenth Circuit's decision does not directly conflict with this Court's opinions in *Simmons* and *Shafer*. The underlying concern of the Court in both decisions is that of ensuring due process in capital sentencing. The critical focus is on avoiding the creation of a "false choice" for jurors entrusted with making the most serious of moral judgments. If future dangerousness of the defendant is an issue, then the jury must not be led to believe that death is the only manner of removing the defendant from society when, in fact, there is an alternative of imprisoning the defendant for life without possibility of parole.

The Tenth Circuit has repeatedly held that Oklahoma's statutory sentencing scheme complies with the due process concerns expressed in *Simmons* and *Shafer*. That is to say, so long as the jury is advised of its options (death, life without parole, or life imprisonment), the concern for "false choice" is eliminated in cases where the prosecution seeks death based on future dangerousness. The Tenth Circuit's decision in Respondent Johnson's case is a narrow one, limited to the facts of Respondent Johnson's case. The Tenth Circuit's decision reaffirms the constitutionality of Oklahoma's capital sentencing scheme, and finds only that there was a due process violation when the trial judge failed to refer the jury back to the original instructions

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[1] Respondent Johnson's trial counsel requested the trial court to respond simply, "You have received all that you're going to receive in this matter."

[2] Petitioner Gibson devotes substantial argument to his theory that the jury was inquiring into the concepts of sentence commutation and executive clemency, and that the trial court's note honestly advised the jury that such concerns were not for their deliberation. (Petition for Writ of Certiorari, p. 13). Nothing in the record suggests the jury was making such inquiry, and Petitioner Gibson offers no explanation as to why his clairvoyance into the jury's concerns should be given greater weight than that of the Tenth Circuit (i.e. "At best, the jury had a conflict between the court's instructions as to whether it was proper to consider parole eligibility in imposing sentence. At worst, the jury may very well have thought that parole was available, even with the life without parole option, but for some unknown reason it could not consider that fact." Opinion, p. 21).

and, instead, directed the jury not to consider the question of parole eligibility when future dangerousness was an issue.

The due process concerns expressed in *Simmons* and *Shafer* necessarily apply in situations where the jury is misled as to parole eligibility when future dangerousness of the defendant is an issue. The Tenth Circuit correctly noted that the Oklahoma Court of Criminal Appeals intended to apply federal law to the issue presented when the Oklahoma court cited to *Chapman v. California*, 386 U.S. 18 (1967), in its analysis. Nowhere in its decision did the Oklahoma court confirm or suggest that this issue was purely a matter of state law. Where a state court decision is interwoven with the federal law, and the adequacy and independence of any possible state law ground is not clear from the face of the opinion, a presumption in favor of federal jurisdiction over the issue on habeas review exists. *Coleman v. Thompson*, 501 U.S. 722 (1991). The state court may only avoid this presumption by clearly and expressly stating that its decision is based on "bona fide separate, adequate, and independent grounds." *Michigan v. Long*, 463 U.S. 1032 (1983).

The Tenth Circuit's decision correctly applies the AEDPA standards to its analysis of the constitutional error. If the state court intended to apply *Simmons*, and concluded the error was harmless, the application of the harmless error doctrine to the *Simmons/Shafer* constitutional violation was an unreasonable application of federal law. If the court failed to apply the underlying due process principles of *Simmons/Shafer* (i.e. the elimination of "false choice" concerns within the context of future dangerousness and parole eligibility), the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Though not addressed by the Tenth Circuit's opinion, Respondent Johnson argued below, and continues to maintain, that subjecting a defendant to death based on the verdict of a jury which was not fully informed of its sentencing options – which, in fact, was specifically misinformed of its options – is both a denial of due process and a violation of the Eighth Amendment proscription on cruel and unusual punishment. Respondent Johnson maintains the death sentence failed to comply with the heightened standards "for reliability in the determination that death is the appropriate punishment." *See Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Beck v. Alabama*, 447 U.S. 625 (1980).

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Stephen J. Greubel
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Telephone: (918) 582-6750

Counsel of Record
Attorney for Respondent/Cross-Petitioner

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CERTIFICATE OF SERVICE

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September 24, 2001

CERTIFICATE OF SERVICE

In accordance with Supreme Court Rules 29.3 and 29.5(b), Stephen J. Greubel, a member of the Bar of this Court, hereby states that all parties required to be served the Brief in Opposition to Petition for Writ of Certiorari in the captioned case have been served.

Specifically, on September 24, 2001, I served Mr. W.A. Drew Edmondson, Attorney General of the State of Oklahoma, 112 State Capitol, Oklahoma City, Oklahoma 73105-4894, Telephone (405) 521-3921, Attorney for Petitioner/Cross-Respondent Gary Gibson, by depositing with the United States Postal Service, with no less than first-class postage prepaid, and addressed to Mr. Edmondson at the proper post office address set forth above, three (3) copies of the Brief in Opposition to Petition for Petition for Writ of Certiorari.

Respectfully submitted,

Stephen J. Greubel, OBA #10653
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Attorney for Respondent/Cross-Petitioner
Mark David Johnson

STEPHEN J. GREUBEL
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September 24, 2001

Mr. William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Brief in Opposition to Petition for Writ of Certiorari
Gibson v. Johnson, Case No. 01-335

Dear Mr. Suter:

As court appointed counsel I am writing to you on behalf of my client Mark David Johnson. I am timely submitting for filing the original and eleven (11) copies of his Brief in Opposition to Petition for Writ of Certiorari, Motion to Proceed in Forma Pauperis, and Proof of Service.

Sincerely,

Stephen J. Greubel